



PROTECT SUPREME COURT INDEPENDENCE

The Constitution gives the President power to nominate justices to the Supreme Court of the United States (SCOTUS) and the Senate to “Advise and Consent” for confirmation of that nomination.¹ On September 26, 2020, then-President Trump nominated Judge Amy Coney Barrett to succeed the late Justice Ruth Bader Ginsburg to the Supreme Court. Due to the timing of the nomination being months before the election, opponents to the nomination called it an “illegitimate power grab”² and launched public discussions of court packing that continue today. These discussions ignore important lessons from the long history of the Court.

- At least 11 candidates were open to packing the Court during the 2020 Democratic Presidential primary.³
 - Vice President Kamala Harris, for example, stated in 2019 that, “We are on the verge of a crisis of confidence in the Supreme Court,” and, “everything is on the table” to combat this challenge.⁴
- On April 9, 2021, President Joe Biden announced the formation of the Presidential Commission on the Supreme Court of the United States to analyze the need for expanding the Supreme Court, among other reforms.⁵

SCOTUS Nominations During Election Years

- The current nomination process is abnormally long and difficult. For the first three-quarters of the Court’s existence, nominees waited a median of one week to receive either confirmation or rejection.⁶
 - Public, televised hearings attended by the nominee, the most significant cause of recent time delays, did not occur until 1981.
- Judicial nominations also took place in election years throughout the country’s history. Many of these nominations, including 90% of those made through 1968 before an election in an election year, were confirmed.⁷
- Supreme Court vacancies occurred 29 times during presidential election years or a lame-duck session before the next inauguration. These have taken place under the administrations of 22 different presidents, each of whom made a nomination to fill the vacancy.⁸
- Between 1796 and 1968, 19 nominations occurred in an election year when the same party held the Senate majority and the presidency. 9 of the 10 pre-election nominations were confirmed.^{9,10}

Court Packing

- Court packing is the process of expanding the size of the Supreme Court past the current 9 justices in order to, as the late Justice Ginsburg said, “have more people who will vote the way you want them to.”¹¹

- The Constitution does not require that the Supreme Court have a specific number of justices. Instead, Congress sets the number via statute.¹²
 - Court packing is not a new concept. The most notable attempt to pack the court came from President Franklin D. Roosevelt in 1937. After the Court repeatedly overturned his New Deal, he introduced a plan to appoint a new judge in all federal courts for each judge older than 70 that chose not to resign or retire.¹³ The Senate Judiciary Committee found that the purpose of the legislation was, “to increase the number of Justices for the express purpose of neutralizing the views of some of the present members.”¹⁴
- Attempts to influence the Court through court packing have been unsuccessful for over 150 years¹⁵ and widely condemned as a significant threat to the independence of the Court.
- Court packing would destroy the critical independence of the judicial branch.
 - It would serve as a means for Congress to reverse the Court’s rulings by enlarging the Court.
 - It would transform the Court into a highly partisan institution¹⁶ and limit the Court’s ability to provide a check on Congress’ power.¹⁷
- The Biden Commission’s October 2021 discussion materials highlighted concerns with expanding the Court, stating, “[T]he risks of Court expansion are considerable, including that it could undermine the very goal of some of its proponents of restoring the Court's legitimacy.”¹⁸

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¹ U.S. Const. art. 2 § 2 cl. 2 Accessed 09/23/20 at <https://constitution.congress.gov/constitution/>

² “Warren won’t meet with Barrett (...)” by Justine Coleman. Accessed 09/30/20 at <https://thehill.com/homenews/senate/518802-warren-wont-meet-with-trumps-supreme-court-nominee-calling-it-illegitimate>

³ “Where Democrats stand” Accessed 09/24/20 at https://www.washingtonpost.com/graphics/politics/policy-2020/voting-changes/supreme-court-packing/?itid=lk_inline_manual_8&itid=lk_inline_manual_29

⁴ “2020 Dems warm to expanding (...)” by Burgess Everett and Marianne Levine. Accessed 09/24/20 at <https://www.politico.com/story/2019/03/18/2020-democrats-supreme-court-1223625>

⁵ <https://www.whitehouse.gov/pscscotus/>

⁶ From the appointment of the Supreme Court’s first justices in 1789 until 1966, a median of 7 days passed between when a nomination was first sent to the Senate and a final action was taken on the nomination. “Supreme Court Nominations, 1789 to 2017” by Barry McMillion and Denis Steven Rutkus. Accessed 09/23/20 at <https://crsreports.congress.gov/product/pdf/RL/RL33225>

⁷ “ICYMI: History Is On the Side of Republicans Filling a Supreme Court Vacancy in 2020” by Dan McLaughlin Accessed 09/29/20 at <https://www.grassley.senate.gov/news/news-releases/icymi-history-side-republicans-filling-supreme-court-vacancy-2020>

⁸ *Id.*

⁹ *Id.*

¹⁰ Associate Justice Abe Fortas was nominated by President Lyndon Johnson to be elevated to Chief Justice in 1968. His nomination was rejected. Justice Fortas later resigned amid an ethics inquiry in 1969.

¹¹ “Is it possible to Expand the Supreme Court?” from a radio show with Mary Louise Kelly and Judge Glock. Accessed 09/24/20 at <https://www.npr.org/2020/09/21/915381446/is-it-possible-to-expand-the-supreme-court>

¹² The Judiciary Act of 1869 set the court at nine justices and that has been the case for over 150 years. “An Act to Amend the Judicial System” Accessed 09/29/20 at <https://www.loc.gov/law/help/statutes-at-large/41st-congress/session-1/c41s1ch22.pdf>

¹³ “What is Court Packing, and Why Are Some Democrats Seriously Considering It?” by Amber Phillips. Accessed 09/24/20 at <https://www.washingtonpost.com/politics/2020/09/22/packing-supreme-court/>

¹⁴ “No to ‘Packing the Court’ by Thomas Jipping. Accessed 09/29/20 at <https://www.heritage.org/courts/commentary/no-packing-the-court>

¹⁵ “What is Court Packing, and Why Are Some Democrats Seriously Considering It?” by Amber Phillips. Accessed 09/24/20 at <https://www.washingtonpost.com/politics/2020/09/22/packing-supreme-court/>

¹⁶ “Is it possible to Expand the Supreme Court?” by Mary Louise Kelly and Judge Glock. Accessed 09/24/20 at <https://www.npr.org/2020/09/21/915381446/is-it-possible-to-expand-the-supreme-court>

¹⁷ “Expressing the sense of the House of Representatives (...)” by Rep. Jim Jordan. Accessed 09/24/20 at https://republicans-judiciary.house.gov/wp-content/uploads/2020/09/KD_001_xml.pdf

¹⁸ https://www.whitehouse.gov/wp-content/uploads/2021/10/MEMBERSHIP-AND-SIZE-OF-THE-COURT_.pdf